IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 822 of 1989

with

CRIMINAL APPEAL No 2 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgementsJJJJJJJJJJJJJ : YES

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MR SP DAVE,APP for Petitioner
NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE J.R.VORA

Date of decision: 24/08/2000

ORAL JUDGEMENT (K.R.Vyas,J.)

1. These two criminal appeals arise out of the judgment and order passed in Sessions Case No.43 of 1987 dated 19th September 1989 by the learned Sessions Judge, Amreli convicting accused no.1 Koli Arjan Vira, the appellant in Criminal Appeal No. 822 of 1989 for the offence punishable under section 302 of the IPC and sentencing him to suffer R.I.for life. The learned judge was pleased to acquit accused nos.2 and 3 (respondents no. 1 and 2 in Criminal Appeal No. 2 of 1990) for the offence punishable under section 302 read with section 34 of the IPC,however, convicting the accused no.2 Koli Sata Vira of the offences punishable under section 323 of the IPC and sentencing him to suffer R.I.for one year and to pay a fine of Rs. 1000/-, in default, to undergo S.I. for three months. The learned judge convicted accused no.3 Koli Ravji Vira for the offence punishable under section 324 of the IPC and sentenced him to suffer R.I. for two years and to pay a fine of Rs. 1500/-, in default, to undergo S.I. for four months. The State of Gujarat, therefore,filed Criminal Appeal No. 2 of 1990 against the accused nos. 2 and 3 challenging the judgment and order of acquittal for offence punishable under section 302 read with section 34 of the IPC.

2. The incident in question happened in the early morning of 25.3.1987 between 6.00 and 7.00 a.m. in village Khambhala of Babra taluka when all the accused committed murder of Sattar Rahim and Ajij Haji Hussein by inflicting injuries with axe, stick and pipe. It is the prosecution case that two or three days prior to the date of the incident, the accused no.1 was arrested for committing offence under the Prohibition Act at the instance of deceased Sattar Rahim. All the accused, therefore, with a view to take revenge, came to the shop of the deceased Sattar Rahim and started giving abuses to him. The accused no.1 dragged the deceased Sattar Rahim from his shop and inflicted blunt portion of axe on his head while the accused nos. 2 and 3 also inflicted blows on the person of the deceased with stick as well as pipe.

It is the further case of the prosecution that when neighbour Ajij Haji Hussein tried to intervene, the accused no.1 also caused injuries on his head by inflicting blows with the blunt portion of axe and subsequently the accused nos. 2 and 3 caused injuries with their respective weapons on the person of deceased Ajij Haji Hussein. Both the injured persons were thereafter taken to Babra Primary Health Centre where they were given primary treatment by the Medical Officer Dr. Shobhnaben Mehta, Ex. 64. Considering the seriousness of the injury on both the injured persons, Dr. Mehta referred them to Civil Hospital, Rajkot. Injured Sattar Rahim succumbed to the injury on the same evening while Ajij Haji succumbed to injury on the next day in the Civil Hospital.

3. The complainant Rafik, Ex. 51, son of the deceased Ajij Haji Hussein filed a complaint Ex. 52 at Babra Police Station. After registering the offence, PSI S.M. Patel started investigation and ultimately submitted chargesheet against the accused.

4. The learned Sessions Judge framed charge at Ex. 1 against the accused to which the accused denied their involvement in the commission of crime and claimed to be tried. The defence of the accused was of total denial and that they have been falsely involved in the offence. The learned judge, after appreciating evidence on record, passed the impugned judgment and order as stated in para 1 of this judgment.

5. It is stated at the bar that the appellant of Criminal Appeal No. 822 of 1989 Koli Arjan Vira, accused no.1 has been released on 16.6.1999 by the State Government by exercising powers under section 433 of the Code of Criminal Procedure. In view of this, the decision of his appeal has become mere academic.

Since the accused nos. 2 and 3 were charged for the offence punishable under section 302 read with section 34 of the IPC and since the learned judge has acquitted them of the said offences by holding that the prosecution has failed to prove that there was common intention on their part of committing murder of both the deceased and in absence of the same, they are liable to be convicted for their individual act, the only question that arises for our consideration is whether the accused nos. 2 and 3 can be convicted for the offence punishable under section 302 read with section 34 of the IPC.

6. The prosecution, in order to bring home the

charge levelled against the accused, placed reliance on the evidence of five eye witnesses, namely complainant Rafik Ex. 51, Nathu Bhikha Ex. 55, Bilal Noormahmad Ex. 56, Harun Noormahmad Ex. 57 and Allarkha Ex.70.

Rafik, Ex.51, in his evidence, has tried to involve all the accused in the commission of crime by stating that on the day in question, he and his father deceased Ajij had gone to their shop at about 6.30 a.m. and when they were cleaning their shop, they heard shouts and quarrel going on in the adjoining shop and the accused were giving abuses to deceased Sattar and were telling that since they were involved in the prohibition case, they have come to take revenge. According to him, the accused no.1 thereafter climbed the 'ota'of the shop of Sattar and dragged him out of his shop and hit his head with the blunt portion of the axe with the result, Sattar fell down on the ground and blood started oozing out from his head. Thereafter, accused nos. 2 and 3 started beating Sattar with stick and pipe and inflicted about eight to ten blows on the person of Sattar. He has no idea as to on which portion the accused nos. 2 and 3 inflicted blows. According to him, his father tried to intervene by telling not to beat him. At that time, again the accused no.1, after giving a push to his father Ajij on the 'ota' of the shop, gave a blow with the blunt portion of the axe on the head of his father. The other accused, after leaving Sattar, also started giving indiscriminate blows on the person of Ajij. According to him, three to four blows were inflicted on his father. According to him, he was watching the incident by standing on his 'ota'. The incident was also watched by Allarkha and one Bilalbhai. The narration of the incident by this witness is corroborated by other eye witnesses almost in an identical way. Therefore, it is not necessary to re-narrate their evidence verbatim. True, there are certain improvements, contradictions and omissions in their evidence, but they are quite minor and they do not change the prosecution case materially. The evidence of the eye witnesses establish the presence of all the accused at the relevant time. However, their evidence about the blows given by accused nos. 2 and 3 does not get support from the medical evidence. Both the deceased were examined first in point of time by Dr. Shobhna Mehta, Ex. 13, Medical Officer of Babra Primary Health Centre. Dr. Mehta found the following injuries on the person of Sattar.

"(1) CLW over right parietal region of the skull
parallel to and 1/2" away from sagittal suture,
vertical in size 2 1/2"x1/2"x skull deep.

(2) CLW over left occipital region oblique 3"x1/2"x1/2".
(3) Abrasion over right eyelid 1"x1/2"x1/2"x1/8"
(4) Abrasion over right toe first 1/4" x1/4"x1/8"
(5) Multiple abrasion over right leg, back etc.
(6) Abrasion over left lone 2 1/2"x1"x1/8"
(7) Fracture of right parietal bone was seen from external examination."

According to her, injuries no.1,2 and 7 were life threatening and these injuries were possible by hard and blunt substance. The patient was serious and was in coma.

On the same day at 9.15 a.m., she examined deceased Ajij and found the following injuries.

"(1) CLW over parietal region 3"x1/2"x skull deep.
(2) CLW over right occipita parietal region transverse, 2 1/2"x1/2"x skull deep.
(3) Fracture of left parietal and occipital bones.
(4) Depressed fracture of occipital bone was found on external examination."

According to her, injuries no. 1 to 4 are life threatening and all these injuries are possible by hard and blunt substance. According to her, all these injuries are possible by the blunt portion of muddamal axe, stick and pipe. In the cross examination, she has admitted that the injuries no. 3 to 6 to deceased Sattar were simple in nature and they were ordinary type of abrasions. According to her, these injuries can be caused by coming into contact of any hard and blunt substance. She has also admitted that there were only injuries no. 1 and 2 which were external injuries on the person of Ajij. She has further admitted that it is true that the head injury to Ajij would be broader in size if it is caused with force by the muddamal stick. It is also true that the fracture on the head of Ajij can be caused only if forceful blow is given by muddamal stick and not otherwise. It is also true that if blow is given on head by muddamal pipe, it would cause depressed wound on the head to the extent the portion of pipe strucks on the head. She has further admitted that the injury no.1 to Sattar would have been broader in size if forceful blow was given on his head by muddamal stick. According to her,injuries no.1 and 2 could not have been caused to Sattar unless forceful blow was given to him with muddamal stick. According to her, injury no.1 to Sattar is one and unified and without any division and same is the condition of injury no.2 with respect to Sattar.

Reading the evidence of Dr.Shobhnaben Mehta, it is clear that the injuries no. 1,2 and 7 on the person of Sattar were serious in nature and considering the size and nature of the said injuries, they were not possible with either stick or pipe. It is not the case of the prosecution that the accused no.2 and 3 also inflicted injuries on the head of Ajij.

7. Dr.Mukundrai Ramanuj, Ex.9,Medical Officer of Civil Hospital, Rajkot who performed the post-mortem of Sattar has stated that all the injuries were antemortem in nature and the cause of death was due to injury no.1 to brain and intracranial haemorrhage as a result of head injury. With regard to the rest of the injuries i.e. injuries no.2,3 and 4, Dr. Ramanuj has though admitted in the cross examination that they are possible by a fall and also possible by coming into contact of any hard and blunt substance, however,he has finally stated that three abrasions which are injuries no.2,3 and 4 in column 17 are not possible by a single fall. We can safely conclude that the accused nos. 2 and 3 were responsible for causing the said injuries on Sattar and, therefore, the medical evidence does corroborate the evidence of eye witnesses to this extent.

8. Dr.M.K.Korvadiya, Ex.11 is the another Medical Officer of Civil Hospital, Rajkot who performed post-mortem of deceased Ajij. He found two external injuries in column 17 on the parietal region and occipital parietal region. Except these two injuries, no other injuries were noticed. According to him, all these injuries were antemortem and possible by hard and blunt portion of muddamal axe, pipe and stick. As stated above,considering the size and nature of the injuries, he has ruled out the use of pipe as well as stick for the head injury of Ajij. Therefore, the accused no.2 and 3 cannot be held responsible for causing head injuries on deceased Ajij. The evidence of eye witnesses involving accused no.2 and 3 for the injuries on the person of deceased Ajij, to this extent, is unreliable and, therefore, not acceptable. In other words, the medical evidence does not get support from the evidence of the eye witnesses as far as the injuries on deceased Ajij are concerned.

9. The aforesaid discussion would go to establish the presence of accused nos. 2 and 3 and the part played by them when the accused no.1 inflicted blows with blunt portion of axe on the head of both the deceased as a result of which,the deceased lost their lives as per the post-mortem report. Therefore, in our opinion, the

learned was right in convicting accused no.1 for the offence punishable under section 302 of the IPC.

10. The question that arises for our consideration, however, is whether the accused nos. 2 and 3 can also be convicted for offence punishable under section 302 read with section 34 of the IPC. Mr. Dave,learned APP for the State, by pointing out the circumstances, submitted that the accused nos. 2 and 3 can also be convicted with the aid of section 34 of the IPC. In the submission of Mr. Dave, the accused nos. 2 and 3, in the early hours of the day in question, came with accused no.1 with weapons and also participated by abusing deceased Sattar and by inflicting blows with their weapons on both the deceased no sooner they fell down on the ground after receiving blows from the accused no.1. Mr.Dave, therefore, submitted that all the accused came at the shop of the deceased Sattar with an intention to commit murder of Sattar with a view to take revenge of involving the accused no.1 in a prohibition case and they not only committed murder of Sattar, but also committed another murder of Ajij who had nothing to do with the incident and who, on the contrary, had just intervened in the incident.

11. Mr. Parikh who filed Criminal Appeal on behalf of the accused no.1, at our instance, appeared for accused nos. 2 and 3 as they did not engage any advocate, and while supporting the judgment of the trial court, submitted that the accused no.2 and 3 cannot be held responsible for committing the offence punishable under section 302 read with section 34 of the IPC even if their presence is established in view of the minor injuries caused by them.

12. Reading the evidence on record, it is clear that the accused came to the shop of deceased Sattar with a view to teach him a lesson as accused no.1 was involved in a prohibition case at the instance of deceased Sattar. The fact that the accused no.1 gave a single blow with blunt portion of the axe on each of the accused would go to suggest that the accused had no intention to commit murder. It is unfortunate that Ajij lost his life for no fault of his at the hands of accused no.1, but the fact remains that the other accused did not cause any injury to him. It is only the deceased Sattar who sustained three injuries of abrasions not on the vital part of the body. This would go to suggest that the accused, even though had a plan to commit the offence, but it was a plan to commit minor offence to teach deceased Sattar a lesson, but unfortunately, during the course of

committing minor offence, major offence was committed. However, when the accused no.1 who was responsible for committing major act,the accused nos.2 and 3 cannot be made vicariously liable merely because they had accompanied the accused no.1. Merely because the accused nos. 2 and 3 inflicted blows after both the deceased fell down, it cannot be contended that they were sharing common intention with accused no.1. There is no evidence on record that the accused nos. 2 and 3 instigated the accused no.1 in any way. As stated above, all the accused came to commit a minor offence namely to teach the deceased a lesson and, therefore, just as accused no.1 caused injury on the deceased, the other accused also participated by using their respective weapons. Since the accused no.1 did not use axe with sharp edged portion and that the other accused also did not use their own respective weapons indiscriminately, it is clear beyond any manner of doubt that there was no common intention to commit murder and in any case, they cannot be held guilty for the act of principal culprit in absence of incriminating evidence. In view of the fact that they have caused only minor injuries on the person of deceased Sattar,in our opinion, the learned trial judge was justified in convicting them for the offence punishable under sections 323 and 324 of the IPC for their individual acts committed by them. Suffice it to say that we are in total agreement with the reasonings given by the learned trial judge in acquitting the accused nos. 2 and 3 for offence punishable under section 302 read with section 34 of the IPC.

13. In the result, we do not find any merit in Criminal Appeal No. 2 of 1990 filed by the State of Gujarat against the accused nos. 2 and 3 and the same is dismissed.

Criminal Appeal No. 822 of 1989 stands dismissed on merits as well as having become infructuous. Bail-bonds stand cancelled.

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